ARCHIVE

APPENDIX A

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BERNARD D. SPECTOR,
Plaintiff-Appellant,

v.

L Q MOTOR INNS, INC., *et al.*,
Defendants-Appellees.

No. 74-2549.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Aug. 8, 1975.

Husband who had received stock, which had been registered in his wife's name, in connection with property settlement, who had sold the stock back to the corporation after receiving assurances from the incorporators, one of whom was his wife, that the corporation's stock was not to be offered to the public, brought action against the incorporators and a successor corporation after the original corporation's assets had been transferred to the successor corporation and that corporation's stock had been offered to the public. The District Court for the Western District of Texas, John H. Wood, Jr., J., dismissed for lack of jurisdiction under the Securities Exchange Act, and husband appealed. The District Court, Gibson, Circuit Judge of the Eighth Circuit, sitting by designation, held that husband's allegations that incorporators had misrepresented to him their intention as to a public offering and that the public offering had brought a higher price for the stock in the successor corporation than husband had been paid for his stock was sufficient to allege the existence of a "sale" within meaning of the Securities Exchange Act and to state a claim within the jurisdiction of the Act.

Reversed and remanded.

1. Courts (Key) 486.5(6)

On appeal from dismissal for lack of jurisdiction, well pleaded allegations of the complaint must be taken as true.

2. Courts (Key) 406.1(11)

In reviewing dismissal of complaint for lack of jurisdiction under the Securities Exchange Act, court is limited to observing whether the complaint is drawn to seek recovery under the federal statute and, if so, determining whether, as a matter of law, the federal claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa.

3. Courts (Key) 299.3(1)

Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action or because the plaintiff might be unable to prove his case; such failures call for dismissal on the merits, not on jurisdictional grounds.

4. Courts (Key) 489(1)

Although divorce and its attendant property settlement are controlled by state law, husband's securities fraud claim against former wife and other incorporators of corporation, stock of whose predecessor husband received as part of property settlement, fell within subject matter jurisdiction of federal courts. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

5. Courts (Key) 289(6)

Where husband brought action against former wife and other incorporators of corporation, stock of whose predecessor husband had received as part of property settlement, fact that the action might be barred by collateral estoppel impact of facts adjudicated in the divorce settlement did not demonstrate lack of jurisdiction in federal court under the Securities Exchange Act. Securities Exchange Act of 1934, §§ 10(b), 27, 15 U.S.C.A. §§ 78j(b), 78aa.

6. Federal Civil Procedure (Key) 1951

In action brought by husband against former wife and other incorporators of corporation based on alleged securities laws violations in connection with husband's sale of stock back to the corporation's predecessor, question of husband's entitlement to recover and question of federal court's jurisdiction over the transaction as a "sale" under the Securities Exchange Act were factually meshed and district court should have considered the merits of the controversy in a plenary hearing in order to insure a proper determination of jurisdiction; decision on the merits should have been reserved until a hearing on the merits. Securities Exchange Act of 1934, §§ 10(b), 27, 15 U.S.C.A. §§ 78j(b), 78aa; Fed.Rules Civ.Proc. rule 12(d), 28 U.S.C.A.

7. Securities Regulation (Key) 60

Husband's allegations that he received, in property settlement, shares of stock in corporation owned by his wife and others, that the stock had been community property registered in his wife's name, that he sold the stock back to the corporation, that the incorporators misled him by stating that they did not have any plans at that time to sell the stock to the public, and that the incorporators thereafter formed a new corporation with the assets of the old and

sold the stock to the public at a price in excess of that received by the husband stated a claim for violation of securities laws. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

8. Courts (Key) 359.1(12)

Precise nature of husband's interest in 40 shares of stock registered in his wife's name was a matter governed by Texas property law.

9. Securities Regulation (Key) 43, 64

Husband's allegations that shares of stock registered in his wife's name were community property and that, before property settlement in which he received some of the shares, which he sold back to the corporation, he individually owned an interest in some of them, that he sold the shares back to the corporation upon assurances that the corporate stock was not to be the subject of public offering, and that the incorporators then transferred the assets of the corporation to a new corporation and offered stock in that corporation to the public at a price in excess of that paid to the husband alleged a "sale" of securities by the husband within meaning of Securities Exchange Act of 1934, §§ 3(a)(14), 10(b), 15 U.S.C.A. §§78c(a)(14), 78j(b).

See publication Words and Phrases for other judicial constructions and definitions.

10. Husband and Wife (Key) 262.1(1)

In community property state such as Texas, beneficial interests of husband and wife in community property are presumptively equal, whether nominal title is in the wife, in the husband, or in both jointly; if, during marriage, property is placed in the wife's name, only legal title vests

in her and equitable title to husband's one-half of the property remains in him.

11. Husband and Wife (Key) 272

Under Texas law, community property remains such unless formally partitioned in one spouse's name in accordance with Texas statutory law or unless transferred by gift from one spouse to the other.

12. Courts (Key) 299.3(2)

Husband who alleged that he had sold certain shares of stock to corporation upon assurances that corporation's stock would not be offerd to the public and that the corporaion's assets were thereafter transferred to another corporation whose stock was offered to the public and that he obtained a much lower price for his stock than was paid by the public adequately alleged injury in fact to give husband standing, within case or controversy requirement, to bring securities fraud action against the incorporators and the successor corporation. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); U.S.C.A. Const. art. 3, § 1 et seq.

13. Securities Regulation (Key) 64

Term "purchase or sale," as used in statute prohibiting use of deceptive and manipulative devices in connection with purchase or sale of securities, and as used in SEC rule relating to the same subject, is not limited to technical common-law sales. Securities Exchange Act of 1934, §§ 3(a)(14), 10(b), 15 U.S.C.A. §§ 78c(a)(14), 78j(b).

See publication Words and Phrases for other judicial constructions and definitions.

14. Securities Regulation (Key) 2

Terms of Securities Exchange Act are to be broadly construed to effectuate the Act's remedial purpose. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

15. Securities Regulation (Key) 139

Husband who alleged that he had obtained shares of stock in corporation in connection with property settlement, that he had sold the shares back to the corporation after obtaining assurances that the corporation's stock was not to be offered to the public, that the incorporators, who included his former wife, thereafter transferred the assets of the corporation to a new corporation and offered successor corporation's stock to the public, and that he received less for his shares than the successor corporation received from the public sufficiently alleged fraud in connection with the sale of a security. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

16. Securities Regulation (Key) 120

Husband who alleged that he had received stock, which had been registered in his wife's name, in connection with property settlement, that he had sold the stock back to the corporation, and that he had been misled by representations made when he sold the stock and thus received less than he should have was arguably within the zone of interest to be protected by the Securities Exchange Act and thus had standing to bring action against the incorporators. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); U.S.C.A.Const. art. 3, § 1 et seq.

17. Courts (Key) 489(1)

Availability of relief under Texas law did not deprive plaintiff of federal forum for his securities fraud action.

Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

Ernest J. Altgelt, III, James D. Stewart, San Antonio, Tex., for plaintiff-appellant.

Joel Pullen, J. Burleson Smith, San Antonio, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before GIBSON,* THORNBERRY and AINSWORTH, Circuit Judges.

GIBSON, Circuit Judge.

This fraud action involves a sale of securities used to fund a divorce property settlement between Bernard D. Spector, the plaintiff, and his wife. Violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1970), SEC Rule 10b—5, 17 C.F.R. § 240.-10b—5 (1974), and pendent state claims[1] are alleged against L J Motor Inns, Inc., its controlling shareholder-directors, Samuel E. Barshop, Philip M. Barshop, and Norman S. Davis, and the plaintiff's former wife, Doris Barshop Spector. Jurisdiction is invoked under § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970).[2] Diversity of citizen-

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* Of the Eight Circuit, sitting by designation.

[1] As pendent claims Spector alleges state securities fraud, breach of fiduciary duty, common law fraud and unjust enrichment.

[2] The statute reads in part:

> The district courts of the United States * * * shall have exclusive jurisdiction of violations of this chapter [2B] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

ship is lacking, so federal jurisdiction rests solely upon the alleged Securities Act violation.

The plaintiff seeks $1,144,406 in damages plus attorney's fees. The defendants, without filing an answer, moved to dismiss for lack of jurisdiction. The District Court after a nonevidentiary hearing granted the motion on the basis that the alleged "sale" of securities was not "the type of transaction intended to be protected and covered" by § 10(b) and Rule 10b—5. We reverse and remand for a plenary hearing on the merits.

[1, 2] Since this is an appeal from dismissal for lack of jurisdiction, the well-pleaded allegations of the complaint must be taken as true. *Mindes* v. *Seaman,* 453 F.2d 197 (5th Cir. 1971); *Herpich* v. *Wallace,* 430 F.2d 792, 802 (5th Cir. 1970). Our review is limited to observing whether the complaint is drawn to seek recovery under a federal statute, and if so, determining whether as a matter of law the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or * * * is wholly insubstantial and frivolous." *Bell* v. *Hood,* 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). If not, dismissal for lack of jurisdiction was error. *Dann* v. *Studebaker-Packard Corp.,* 288 F.2d 201, 206 (6th Cir. 1961).

[3, 4] Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action or because the plaintiff is unable to prove his case. Such failures call for dismissal on the merits, not on jurisdictional grounds. *Bell* v. *Hood, supra* at 682, 66 S.Ct. 773. To be sure, this case presents a novel factual setting for a federal claim of securities fraud, as it arises out of a property settlement in a divorce action. Although the divorce and its attendant property settlement are controlled by state law, plaintiff's 10b—5 claim falls within the subject matter

jurisdiction of the federal courts. Whether plaintiff is entitled to relief depends upon a number of factual questions. The key issue appears to us to be whether plaintiff was the legal and equitable owner of the securities in question with full rights of disposal, unfettered by controlling restrictions on alienation.

The transaction urged as a basis for federal jurisdiction was a transfer of 18 shares of common stock by Spector as part of a divorce property settlement concluded with his wife in the District Court of Bexar County, Texas, March 16, 1972. Immediately after entry of the divorce decree the parties executed and exchanged some 20 documents prepared in advance by counsel for both sides which were the product of two years of negotiation that began in 1969 when Mrs. Spector filed for divorce.

The Spectors' community estate, itemized in the final settlement agreement, included 40 shares of common stock in Barshop Motel Enterprises, Inc. (BME), a privately held predecessor to defendant L Q Motor Inns, Inc., a publicly, held Delaware corporation operating a chain of 31 inns in southwestern states. BME was one of various business interests owned by Mrs. Spector's family, the Barshops. The certificate for the 40 shares of BME stock was registered in Mrs. Spector's name and constituted one-third of the outstanding capital stock of BME. From the start of the negotiations Spector claimed community ownership in the stock. In partial settlement of Spector's community property claims, he was issued a certificate for 18 of the 40 BME shares.[3] A stock purchase agreement was executed by BME contemporaneously, obliging Spector to immediately endorse the certificate back to BME in exchange

[3] The new certificate was dated March 14, 1972, two days before the divorce decree. It represented 15% ownership of the corporation.

for $70,000 cash and a secured promissory note in the amount of $300,000. Spector received other community assets and liabilities in the settlement as well, free of Mrs. Spector's claims.

Soon after BME purchased Spector's 18 shares, the defendants Barshop acquired the stock from BME for the same price, and in June, 1972, they incorporated as L Q Motor Inns, registered with the S.E.C., exchanged BME's assets for L Q stock and successfully sold L Q securities to the public. They acquired an equivalent 151,406 shares of L Q in exchange for the 18 BME shares purchased from Spector and in turn sold them publicly for $1,862,294.[4]

Plaintiff Spector alleged in his complaint, without mentioning the divorce, that during the negotiations for sale of his BME shares he inquired of BME's representatives (the defendants) "as to the current status of [BME's] efforts to effectuate a public sale of its securities." The defendants' response was that discussions with brokerage houses concerning public financing were under way but that there was "not presently in effect any contractual agreement for any such public financing."

BME's formal purchase agreement dated March 16, 1972, contained an express warranty to the same effect—disclaiming the existence of any present public financing contract.[5] The defendants inserted the warranty into the draft

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[4] Thus, in effect, the defendants bought the shares from plaintiff for the equivalent of $2.44 per share and sold them publicly at $12.30 per share. They were able as well to raise $615,000 for the corporation in the public offering.

[5] The BME stock purchase agreement drafted by BMS's counsel states in relevant part:

RECITALS

* * * * * *

[T]here have been discussions with various brokerage houses in the past concerning such public sale of securities and/or

agreement at the request of the plaintiff. Before they signed the warranty on March 16, 1972, however, plaintiff alleges, the defendants had already conducted "discussions, made plans, and [taken] steps to effectuate an exchange offer" in which a new corporation would be formed to acquire BME's assets and to sell securities to the public.[6]

As the basis for his claim of federal jurisdiction Spector argues that the transaction was a "sale" of securities and that the defendants in the March 16, 1972, agreement willfully concealed material facts—that the ultimately successful public offering had already been proposed and specific details discussed with the chosen underwriter. Disclosure of the proposed public sale, Spector argues, was necessary in the circumstances to prevent BME's statements from being misleading to him. And, had the defendants disclosed

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public financing and/or mergers with third parties and * * * such discussions are continuing and are expected to continue in the future, but BME has warranted to Spector that there is not presently in effect any contractual agreement for any such public financing * * * (Emphasis added.)

[6] The extent to which these plans were then finalized into a "public financing contract" are in dispute. In his brief on appeal to this court the plaintiff alleges that in June, 1971, three of the defendants met officers of E. F. Hutton & Co. concerning a public offering of securities of the chain of motels controlled by BME. After the conference a vice-president of E. F. Hutton's New York corporate underwriting department reportedly stated in a letter to BME:

> Based on what we know to date, it appears eminently reasonable to expect a highly successful offering for BME early in 1972 * *.

During the fall and winter of 1971, BME's counsel continued working on the proposed public offering with E. F. Hutton. On March 8, 1972, the week before BME purchased Spector's 18 shares, defendant Davis and a member of his law firm attended a conference in San Antonio between the Barshops and three officers of E F. Hutton. It was then agreed, plaintiff alleges, that a prospectus would be prepared and filed with the S.E.C. for a public offering of roughly 300,000 shares at approximately $15.00 per share.

their plans to him he would have "refused to sell his common stock, or any part thereof, at the price at which it was actually sold."

The only question now presented is whether the trial court erred in dismissing the suit for lack of jurisdiction without hearing the merits. Allegations of a violation of § 10(b) and Rule 10b–5 were made, but no proof was offered beyond the documents relating to the property settlement negotiations, divorce decree and L Q Motor Inns' public financing.[7] At the end of the hearing the court summarily dismissed the suit, finding that the plaintiff's cause of action grew out of an indivisible property settlement in the divorce action and concluding that the instant transaction was not of a type intended to be covered by the Act.[8] Plaintiff, of course, was still free to seek relief in the Texas courts.

[5] In support of dismissal, the defendants argue that the court lacks subject matter jurisdiction because no "sale" of securities took place. Spector, they argue, merely agreed to settle his community property claims against his wife in exchange for $400,000. The 18 shares of BME stock was used as a medium or device to supply $370,000 of the $400,000 settlement. The Barshops agreed (through BME) to issue Spector 18 shares of stock only for the purpose of purchasing it back from him immediately for $70,000 cash and a $300,000 note. At no time, they argue, did any "separate, independent negotiations [take place] which were

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[7] The documents included correspondence between Spector's counsel and counsel for Mrs. Spector (and BME) detailing the proposed property settlement, the settlement agreement itself, the judgment of divorce, the BME stock purchase agreement, the exchange offer and bill of sale transferring BME's assets to L Q Motor Inns, and L Q prospectus, memoranda to the court, and affidavits of defendants' counsel discussing the transaction.

[8] The court's May 7, 1974, memorandum opinion is unreported.

unrelated to the divorce suit based solely on a true purchase and sale of the BME shares." The stock purchase was simply "the means used to get this money to Spector."[9]

[6] The District Court, we believe, should have considered more extensively the merits of the controversy in a plenary hearing in order to insure a proper determination of jurisdiction. The jurisdictional and substantive issues are factually meshed. Therefore, decision on the jurisdictional issues is dependent on decision of the merits and should have been reserved until a hearing on the merits. *Land* v. *Dollar,* 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *McBeath* v. *Inter-American Citizens for Decency Committee,* 374 F.2d (5th Cir.), *cert. denied,* 389 U.S. 896, 88 S.Ct. 216, 19 L.Ed.2d 214 (1967). If the plaintiff prevails on his theory on the merits then he would also prevail on the jurisdictional issue. It is impossible to decide one without the other. *See also Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186, 213–14, 95 S.Ct. 392, 42 L.Ed.2d 378 n. 10 (1974)

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[9] In short, the defendants argue that the plaintiff is trying to cast his claim in 10b-5 terms because in that posture he has a "risk free shot" at improving his divorce settlement by more than one million dollars. That may be true, but to characterize the instant case as no more than a relitigation of the divorce action is to miss the point of Spector's complaint.

Hardy v. *Bankers Life & Cas. Co.,* 232 F.2d 205 (7th Cir.), *cert. denied,* 351 U.S. 984, 76 S.Ct. 1051, 100 L.Ed. 1498 (1956), upon which defendants rely, is inapposite here. It was a civil diversity action for conspiracy in which summary judgment was granted and affirmed upon res judicata grounds because the claim was foreclosed by a prior settlement in a state divorce proceeding involving substantially the same parties. The same claim of fraud was raised in the divorce action and rejected by the state court against the plaintiff. The instant case, however, is a 10b-5 claim dismissed on jurisdictional grounds involving issues not revealed by the record as having been litigated in the state divorce court. We intimate no view, however, of the possible collateral estoppal impact of facts adjudicated in the divorce settlement.

(Douglas, J., dissenting).[10] Such a procedure is authorized by Rule 12(d), Fed.R. Civ.P.

[7] Dismissal for failure to state a claim would also be inappropriate on the present record. It does not appear "to a certainty" that Spector would *not* be entitled to recover under any state of facts which could be proved in support of his claim. *Cook & Nichol, Inc.* v. *Plimsoll Club*, 451 F.2d 505, 506–07 (5th Cir. 1971). Moreover, because a decision on the merits in this case involves close factual questions of intent, reliance, and motive, along with legal questions on the significance of property rights recognized or created by the divorce settlement, summary judgment without a plenary hearing would be inappropriate. We do not suggest, however, that a directed verdict for the defendants might not be appropriate after all the evidence is in nor do we intimate any view on the merits of either party's position.

[8-11] That a sale of securities was alleged and can be proved by the plaintiff cannot be realistically disputed here. The precise nature of Spector's interest in the 40 BME shares registered in his wife's name is a matter governed by Texas property law and is not now before use. Suffice it to say, however, that the plaintiff has alleged facts which, with the documentary evidence before the District Court on the motion to dismiss, support a finding that the 40 shares were community property and that before the divorce settlement Spector individually owned an interest in at least some of them, notwithstanding that the shares were registered

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[10] *Cf. The Fair* v. *Kohler Die Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 412, 57 L.Ed. 716 (1913), in which Mr. Justice Holmes stated: [W]hen the plaintiff bases his cause of action .upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim. * * * [I]f the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad.

in his wife's name.[11] Thus, at this early stage in the proceedings, plaintiff is entitled to an inference that at all relevant times, even before he property settlement, he owned an alienable interest in the BME stock. *See Hilley* v. *Hilley,* 342 S.W.2d 565, 568 (Tex.1961).

That Spector requested the defendants to insert the warranty into the BME stock purchase agreement to disclaim the existence of a public financing contract lends credibility to his claim of ownership. If Spector viewed his interest in the 18 shares as merely that of a pay-out conduit, as defendants argue, BME's future plans for financing would be of no concern to him. However, at this stage in the case we have no idea what the facts were. Thus, to dismiss the exchange of stock as merely part of an "indivisible" divorce settlement not cognizable under 10b-5 was premature. In the divorce settlement, of course, Spector's

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[11] In community property states such as Texas, the beneficial interests of husband and wife in community property are presumptively equal, whether nominal title is in the wife, husband or both jointly. Thus, if during marriage property is placed in the wife's name, only legal title vests in her and equitable title to the husband's one-half of the property remains in him. *Carter* v. *Barnes,* 16 S.W.2d 136, 139 (Tex.Civ.App.1929), *rev'd on other grounds,* 25 S.W.2d 606 (Tex.Comm.App.1930). Community property remains such unless formally partitioned in one spouse's name in accord with Texas statutory law, or unless transferred by gift from one spouse to the other. *Hilley* v. *Hilley,* 342 S.W.2d 565, 567-68, 571 (Tex.1961).

The instant record contains no findings of fact and scant evidence concerning the method by which Mrs. Spector acquired the certificate for 40 shares of BME stock — whether by gift, descent, or purchase with separate or community funds. Nor are there facts revealing any intent of the husband and wife that she would acquire the shares as her separate property, and no evidence of formal partition has been offered by the defendants to indicate such intent. On the contrary, there appears to be a judicial admission by the defendants and a similar decree by the Texas divorce court that Mr. and Mrs. Spector owned 40 shares as community property before the divorce and that Spector owned 18 shares free and clear of claims by his wife thereafter.

community property equity in BME was liquidated to 18 shares and a stock certificate was issued to him March 14, 1972. The contract of sale to BME was executed two days late, March 16, 1972, immediately after the property settlement was approved and the divorce decree entered in state court. To label this transaction a "sale" requires no strained construction of that term.[12]

We believe the issue presented here can better be framed as a question of standing to be decided within the framework of the case or controversy requirement of Article III of the Constitution. *Herpich* v. *Wallace,* 430 F.2d 792, 805 (5th Cir. 1970). In determining whether a 10b-5 plaintiff has standing to invoke the federal remedy:

> "[T]he first question is whether the plaintiff alleges that the challenged [conduct] has caused him injury in fact, economic or otherwise." The second question is whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected" by section 10(b) and Rule 10b-5 thereunder.

Herpich v. *Wallace, supra* at 805 (citations omitted).

[12-16] The first question can be resolved easily. There is no doubt that Spector adequately alleged injury in fact. He claims he was deprived by the defendants of a reasonable opportunity to make an informed, intelligent decision regarding his sale of the securities and suffered a loss in

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[12] Section 3(a)(14) of the Act, 15 U.S.C. § 78c(a)(14) (1970), states:

Definitions and Application.

(a) *Definitions.*

When used in this chapter, unless the context otherwise requires —

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(14) The terms "sale" and "sell" each include any contract to sell or otherwise dispose of.

the sense of deprivation of a foreseeably more profitable sale had he known of the public financing plans.

The second question — whether the interest Spector seeks to protect is arguably within the zone of interests to be protected by the Act — reduces to whether the plaintiff has alleged with reasonable clarity that he sold securities that he had a right to sell, and that the sale was the subject of the fraudulent scheme or that the inducement of the sale was a purpose of the scheme. *Herpich* v. *Wallace, supra* at 808-09. The "purchase or sale" referred to in the statute and rule are not limited to technical common-law sales. *Dasho* v. *Susquehanna Corp.,* 380 F.2d 262 (7th Cir.), *cert. denied sub nom. Bard* v. *Dasho,* 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 470 (1967); *see Hooper* v. *Mountain States Securities Corp.,* 282 F.2d 195 (5th Cir. 1960), *cert. denied,* 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693 (1961). The terms of the Act are to be broadly construed to effectuate its remedial purpose. *Tcherepnin* v. *Knight,* 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967). We conclude that the plaintiff has adequately alleged fraud in connection with a sale of securities.

[17] The availability of relief under Texas law does not deprive Spector of his federal forum. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U.S. 6, 12, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971). However, he must still prove his federal claim. We hold only that plaintiff must be gvien a chance to do so and that the court has jurisdiction to determine its jurisdiction by proceeding to a hearing on the merits.

The judgment of dismissal is reversed and the case remanded for further proceedings consistent with this opinion.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 74-2549

D. C. DOCKET NO. CA 73-285

BERNARD D. SPECTOR,
Plaintiff-Appellant,

v.

L Q MOTOR INNS, INC., ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before GIBSON,* THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 8, 1975

Issued as Mandate:

* Of the Eighth Circuit, sitting by designation.

United States Court of Appeals

FIFTH CIRCUIT

Office of the Clerk

October 3, 1975

TO ALL COUNSEL OF RECORD

No. 74-2549

Bernard D. Spector v. LQ Motor Inns, Inc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(x) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(x) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By CLARE F. SACHI ,
Deputy Clerk

cc: Mr. Ernest J. Altgelt, III
Mr. James D. Stewart
Mr. Joel Pullen
Mr. J. Burleson Smith

APPENDIX B

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IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BERNARD D. SPECTOR

Plaintiff,

CA No. SA-73-CA-285

SAMUEL E. BARSHOP, PHILIP M. BARSHOP, DORIS BARSHOP SPECTOR, NORMAN S. DAVIS and L Q MOTOR INNS, INC.

Defendants.

MEMORANDUM AND ORDER DISMISSING CAUSE FOR LACK OF JURISDICTION

On the 24th day of April, 1974, came on to be heard Defendants' Motion to Dismiss this cause for lack of jurisdiction. All parties announced ready on the motion upon the record then before the Court.

Plaintiff's sole basis for Federal jurisdiction is alleged violations of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C.78j) and Rule 10(b)-5 promulgated thereunder by the Securities and Exchange Commission. In addition, Plaintiff alleges violations of the Texas securities laws, common law fraud and breach of fiduciary duties. These, of course, are based upon pendent jurisdiction and must be dismissed unless there is a viable Federal claim supporting jurisdiction in this Court.

After considering the pleadings, the record including the affidavits and other materials filed by the parties, and the briefs and argument of counsel, the Court found, and now finds, that:

1. Plaintiff's alleged causes of action grow out of an indivisible property settlement in a divorce action in which final judgment was entered in a Texas State Court of competent jurisdiction over divorce property settlements;

2. There were no separate independent negotiations concerning the value of any particular shares of stock involved in the divorce settlement, but, rather, the parties first agreed on a dollar amount which the Plaintiff here (the Defendant in the Divorce Action) would receive as his part of the partition of the property involved in the divorce settlement and then they agreed upon a method of realizing that dollar amount so determined. The method agreed upon by them prior to the entry of the divorce decree awarded to the Plaintiff here certain shares of stock which the Defendant Doris Barshop Spector was obligated to buy (or to provide a buyer) and which the Plaintiff here was obligated to transfer for an agreed consideration immediately after the entry of the divorce decree. This agreement made before the entry of the divorce decree was executed and consummated, as agreed, immediately after the entry of the divorce decree, which also approved the property settlement, all as a part of the overall agreement between the parties.

3. The Plaintiff here is attempting to re-open an indivisible property settlement without tendering what he received in the settlement or without having sought relief in the Texas State Court which entered the divorce decree and approved the property settlement; and

4. The Plaintiff can obtain all of the relief to which he is entitled in the Texas State Courts, and his counsel so conceded in open Court on oral argument.

Accordingly, the Court concludes (1) that this is not the type of transaction intended to be protected and covered by Section 10(b) and (2) that this Court has no jurisdiction over the alleged Federal cause of action. Accordingly, Defendants' Motion to Dismiss is granted as to all causes of action alleged in the Plaintiff's Complaint.

Entered this 7th day of May, 1974.

/s/ JOHN H. WOOD, JR.
John H. Wood, Jr.
United States District Judge

San Antonio, Texas
May 7, 1974

APPENDIX C

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Securities Exchange Act of 1934 — 15 § 78c

Definitions and application — Definitions

(a) When used in this chapter, unless the context otherwise requires —

(14) The terms "sale" and "sell" each include any contract to sell or otherwise dispose of.

Securities Exchange Act of 1934 — 15 § 78j

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

S.E.C. Rule 17 C.F.R. 240.106-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Federal Rule of Civil Procedure 12(b)

Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be

granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.